RECORD NOS. 16-4168(L); 16-4199; 16-4230

In The
United States Court of Appeals
For The Fourth Circuit

UNITED STATES OF AMERICA,

Plaintiff – Appellee,

v.

SHANNON D. ASHWORTH; JASON A. TOMSHA; JAMES M. DAY,

Defendants – Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA AT ANDERSON

BRIEF OF APPELLANTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION 1

STATEMENT OF THE ISSUES 2

STATEMENT OF THE CASE AND FACTS 2

SUMMARY OF ARGUMENT 9

STANDARD OF REVIEW (ARGUMENT I) 10

I. DID THE DISTRICT COURT FULLY COMPLY WITH THE REQUIREMENTS OF RULE 11 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE WHEN THE COURT ACCEPTED THE DEFENDANTS' GUILTY PLEAS 10

STANDARD OF REVIEW (ARGUMENT II) 15

II. WAS THE DISTRICT COURT'S SENTENCE REASONABLE 16

1. The Guidelines were accurately calculated 28

2. Failure to treat similarly situated defendants with even a semblance of consistency constitutes substantive unreasonableness 29

3. Did the District Judge give excessive weight to one particular sentencing factor? 32

CONCLUSION 33

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF FILING AND SERVICE

TABLE OF AUTHORITIES

Page(s)

CASES

Anders v. California,
386 U.S. 738 (1967)....................9, 25, 32, 33

Gall v. United States,
128 S. Ct. 586 (2007)....................15, 30, 31

United States v. Abu Ali,
528 F.3d 210 (4th Cir. 2008)....................24, 29

United States v. Bellamy,
264 F.3d 448 (4th Cir. 2001)....................31

United States v. Diosdado-Star,
630 F.3d 359 (4th Cir. 2011), *cert denied*,
131 S. Ct. 2946 (2011)....................29, 31

United States v. Engle,
592 F.3d 495 (4th Cir. 2010)....................21, 32

United States v. Evans,
526 F.3d 155 (4th Cir. 2008)....................30

United States v. Good,
25 F.3d 218 (4th Cir. 1994)....................10

United States v. Green,
436 F.3d 449 (4th Cir.), *cert. denied*,
126 S. Ct. 2309 (2006)....................16

United States v. Hassan,
742 F.3d 104 (4th Cir. 2014)....................23

United States v. Hernandez–Villanueva,
473 F.3d 118 (4th Cir. 2007)....................16

United States v. Howard,
Op. No. 13-4296 (4th Cir. 2014) 30

United States v. Lymas,
781 F.3d 106 (4th Cir. 2015) 22

United States v. Martinez,
277 F.3d 517 (4th Cir. 2002) 10

United States v. McCoy,
804 F.3d 349 (4th Cir. 2015) 24-25

United States v. McGee,
736 F.3d 263 (4th Cir. 2013) 22, 28

United States v. Moreland,
437 F.3d 424 (4th Cir. 2006) 21

United States v. Myers,
589 F.3d 117 (4th Cir. 2009) 15, 19

United States v. Olano,
597 U.S. 725 (1993)..10

United States v. Pauley,
511 F.3d 468 (4th Cir. 2008) 15

United States v. Seay,
553 F.3d 732 (4th Cir. 2009) 21, 29, 31

STATUTES

18 U.S.C. § 371 ....1, 4, 5

18 U.S.C. § 513 ....1, 4

18 U.S.C. § 1028(a)(7)..1, 4

18 U.S.C. § 1708 ....1, 4

18 U.S.C. § 3553 .... 5, 16, 20, 21

18 U.S.C. § 3553(a) .... *passim*

18 U.S.C. § 3742 2

28 U.S.C. § 1291 2

RULES

Fed. R. Crim. P. 11 .... *passim*

Fed. R. Crim. P. 11(b)(1) 10

Fed. R. Crim. P. 11(b)(1)(J) 14

Fed. R. Crim. P. 11(b)(1)(K) 14

Fed. R. Crim. P. 11(b)(1)(O) 14

Fed. R. Crim. P. 11(b)(2) 12

Fed. R. Crim. P. 11(b)(3) 12

Fed. R. Crim. P. 11(c)(1)(B) 12, 15

Fed. R. Crim. P. 11(c)(2) 12

Fed. R. Crim. P. 11(c)(3)(B) 12, 15

GUIDELINES

U.S.S.G. § 3E1.1(a) 9, 25

U.S.S.G. § 4A1.3 .... 19, 24

U.S.S.G. § 4A1.3(a) 19

U.S.S.G. § 4A1.3(a)(2)(A)(B) 28

U.S.S.G. § 4A1.3(a)(2)(A)(E) 28

U.S.S.G. § 4A1.3(a)(4)(B) 19, 27

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case arises from the criminal prosecution of the Appellants, together with multiple co-defendants, in the United States District Court for the District of South Carolina, Anderson Division. The three named co-defendants were charged with other co-defendants in a one count indictment filed on April 14, 2015. (ECF 3, Day 153) In the indictment the defendants were charged with conspiracy to steal mail and possess stolen mail, to make and possess forged securities in interstate commerce, with the intent to deceive others, and to possess and use identifications of other persons, in violation of Title 18, United States Code, Sections 1708, 513, and 1028(a)(7) and all in violation of Title 18, United States Code, Section 371.

On July 8, 2015, **Shannon Ashworth** pled guilty (ECF 415) to Count I of the indictment, which charged him with conspiracy to possess stolen mail, in violation of Title 18 of the United States Code, Section 371. (ECF 425) Mr. Ashworth was sentenced on March 22, 2016 to 60 months in prison. (ECF 928, p. 19 - 20) The judgment was entered on March 29, 2016 (ECF 827) and Mr. Ashworth timely filed his notice of appeal on March 28, 2016. (ECF 828)

On July 8, 2015, **Jason Tomsha** pled guilty (ECF 422) to Count I of the indictment, which charged him with conspiracy to possess stolen mail, in violation of Title 18 of the United States Code, Section 371. (ECF 432) Mr. Tomsha was sentenced on March 31, 2016 to 60 months in prison. (ECF 944, p. 20) The judgment was entered on April 1, 2016 (ECF 860) and Mr. Tomsha timely filed his notice of appeal on April 11, 2016. (ECF 891)

On July 8, 2015, **James M. Day** pled guilty (ECF 437) to Count I of the indictment, which charged him with conspiracy to possess stolen mail, in violation of Title 18 of the United States Code, Section 371. (ECF 153) Mr. Day was sentenced, on June 3, 2016, to 60 months in prison. (ECF 945, p.21) On April 8, 2016, judgment was entered, (ECF 890) and Mr. Day timely filed his notice of appeal on April 14, 2016. **(ECF 916)**

The Court of Appeals has jurisdiction over this matter pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

STATEMENT OF THE ISSUES

The issues raised in this appeal are whether the District Court fully complied with the requirements of Rule 11 of the Federal Rules of Criminal Procedure in accepting the defendants' guilty pleas, and whether the district court's sentences were reasonable.

STATEMENT OF THE CASE AND FACTS

This case began on August 29, 2011 when the United States Postal Inspection Service (USPIS) in Greenville, South Carolina, received a request for assistance from the Anderson County Sheriff's Office. Jeffery K. Hill had been arrested for Burglary and Grand Larceny charges. When he was arrested, officers found computers, counterfeit checks, stolen mail, ID's, and various other fraudulent items in the central living area. Postal Inspectors went and interviewed Mr. Hill. He confessed to stealing mail, manufacturing ID's and checks. He also implicated several other co-conspirators. Further investigation led authorities to charge the co-defendants in this appeal.

Shannon Ashworth was implicated in the matter by Whitney Strickland who told authorities that "someone" telephoned her and told her that law enforcement was looking for someone at a Tribble Street address. Strickland stated the residence contained stolen mail, check paper, drugs, etc. Knowing law enforcement was coming to the residence, Ms. Strickland informed authorities that Shannon Ashworth told her to "get it out of the house." Strickland refused to give any further information. Officers interviewed Wendy Sisk, Mr. Ashworth's sister, concerning her knowledge of and involvement in mail theft, including collection box break-ins, throughout Anderson County. Ms. Sisk admitted to attempting to cash checks at Quality Foods. She stated that she received some of the checks from Mr. Ashworth. Ms. Sisk also stated that she, and other persons cashed checks for Mr. Ashworth. Mr. Ashworth gave her checks to distribute to other check cashers. She stated names of people to whom she distributed the checks and advised that certain people took stolen merchandise to Mr. Ashworth.

Officers interviewed Tonya M. Reid who stated that she considered herself a partner with Wendy Sisk and sold stolen mail items to Ms. Sisk. Any money she received was split between herself and the person who stole the mail, less expenses. Sometimes Ms. Sisk would pay her in cash, other times, when Sisk was low on cash, she paid in methamphetamine. Sisk's brother, Mr. Ashworth, was a partner and if Ms. Sisk was low on money, he paid Ms. Reid in methamphetamine for the stolen mail she gave to Ms. Sisk. Ms. Reid delivered the mail to Mr. Ashworth at his residence. Ashworth provided her and other persons with credit cards stolen from the mail. The cards were used at gas stations, Best Buy and Target. They purchased items from these stores at Ashworth's direction. Mr. Ashworth usually waited outside in the parking lot. Ms. Reid said she passed approximately ten (10) counterfeit checks at the direction of Mr. Ashworth. Most checks were around $400.00 and most of the time, proceeds were split 50/50 between her and Mr. Ashworth. At Mr. Ashworth's direction, Ms. Reid drove other people to pass checks on several occasions. (Ashworth PSR 11)

Mr. Ashworth was indicted for conspiracy to steal mail and possess stolen mail, to make and possess forged securities in interstate commerce, with the intent to deceive others, and to possess and use identifications of other persons, in violation of Title 18, United States Code, Sections 1708, 513, and 1028(a)(7) and all in violation of Title 18, United States Code, Section 371. (ECF 3)

On June 24, 2015 Mr. Ashworth executed a plea agreement which was filed with the court on June 25, 2015. (ECF 380) In his plea agreement, Mr. Ashworth stipulated and agreed to be held accountable for a loss amount of more than $70,000 but less than $120,000, to be held accountable for more than 50 but less than 250 victims and a 2 level increase for his leadership role in the offense. (ECF 380)

On July 8, 2015, Shannon Ashworth pled guilty (ECF 415) to Count I of the indictment, which charged him with conspiracy to possess stolen mail, in violation of Title 18 of the United States Code, Section 371. (ECF 425) Mr. Ashworth was sentenced on March 22, 2016 to 60 months in prison. (ECF 928, p. 19 - 20) The judgment was entered on March 29, 2016 (ECF 827) and Mr. Ashworth timely filed his notice of appeal on March 28, 2016. (ECF 828)

On November 16, 2015 the court notified Mr. Ashworth that it would consider whether an upward variance to the advisory guideline sentencing range would be appropriate taking into consideration the information contained in the pre-sentence investigation report filed with the court, the sentencing factors contained in 18 U.S.C. Section 3553, other applicable law, and the information presented at the sentencing hearing. (ECF 611)

The Presentence Investigative Report indicated (based on an adjusted total offense level of 15 and criminal history category of VI) that the guideline range was 41 to 51 months. (ECF 928, p. 6, PSR 34)

Counsel for Mr. Ashworth filed objections to the PSR and asked the court to sentence Mr. Ashworth below the guideline level. (ECF 809) At sentencing, on March 29, 2016, Mr. Ashworth's attorney explained that she was objecting to the presentence report to support the logic of filing for a downward departure but questioned the conclusions and not the facts contained in the report. (ECF 928, p. 4) After noting that the court gave notice that it would consider a sentence above the guideline range, Judge Cain reviewed the guideline calculation, explained the pertinent Section 3553(a) sentencing factors, denied M. Ashworth's objections, denied the motion for variance, imposed an upward variance, and sentenced Mr. Ashworth to 60 months of incarceration followed by three years of supervised release. (ECF 827) (ECF 928, p. 12 - 22)

Mr. Ashworth filed a notice of appeal on March 28, 2016.

Jason A. Tomsha - An Anderson County Sheriff's deputy stopped Jason Tomsha on October 20, 2011. He was driving a stolen vehicle. There were a number of checks inside the vehicle. Tomsha admitted during the traffic stop he was responsible for both the stolen vehicle and the checks inside the vehicle. At the Sheriff's Office, he admitted to "kiting" checks. (Tomsha PSR 15)

Deputies interviewed Jessica Todd a few months later. She had been dating Tomsha for around 8 months. She told deputies she had been with Tomsha on several occasion when he went to co-defendant Jeffery Hill's house to get payroll checks. She had been in the car with Tomsha on occasions when he was in possession of stolen mail. While Todd claimed she never stole any mail, she said the car was typically full of stolen mail after a night when Tomsha had been out with Hill. She also claimed to have been with Tomsha on 4 or 5 occasions when he cashed counterfeit or stolen checks. (Tomsha PSR 15)

Tomsha was indicted April 14, 2015 and charged with conspiracy to steal mail, specifically to forge documents with the mail. (ECF 73) He was arrested April 16, 2015. (ECF 75) Tomsha entered a plea agreement with the government on July 7, 2015. (ECF 390) In exchange for his plea of guilty, he entered stipulations with the government regarding the amount of loss, the number of victims involved, and his role in the offense. (ECF 390) His plea was entered the following day in the district court. (ECF 432)

On November 16, 2015 and December 29, 2015, the district court gave Tomsha notice it intended to consider whether an upward departure was appropriate. (ECF 611 & 682)

Tomsha's Pre-Sentence Report calculated a criminal history score of 33, resulting in a criminal history category of VI. (PSR 30) His total offense level was

12. (PSR 32) Based on these calculations, he faced an advisory sentencing guideline range of 30 to 37 months. (PSR 34)

Tomsha filed both a sentencing memorandum and a motion for admission to the federal drug court program on February 15, 2016. (ECF 762 & 763) All motions were denied at Tomsha's March 31, 2016 sentencing hearing and he was sentenced to 60 months in federal prison. (ECF 860)

James M. Day - On January 2, 2014, Day admitted to officers that he passed a stolen check several years ago at the direction of another person, and he stated he had also stolen mail and "checked boxes" a couple of times in Anderson County; on April 23, 2014, co-defendant Tonya M. Reid told officers that James Day and Vanessa Bailey came to Reid's house and she sold them checks stolen from the mail. **(Day PSR 17)** Day admitted to being a part of the conspiracy and possessing stolen mail in furtherance of the conspiracy during the guilty plea. (ECF 922 p. 81 - 83).

Day was indicted April 14, 2015 and charged with conspiracy to steal mail. (ECF 153) He entered a plea agreement with the government on May 18, 2015; in exchange for the plea agreement there were certain stipulations regarding monetary losses, and he had an opportunity to assist the government. (ECF 276) He was given notice that the district judge would consider whether an upward departure was appropriate. (ECF 682)

Day's sentencing guideline offense level for count 1 was correctly computed by reference to the United States Sentencing Guidelines which established a guideline offense level of 10. (ECF 945 p. 5) After a credit of 2 points for acceptance of responsibility pursuant to U.S.S.G. § 3E1.1(a), Mr. Day had a total offense level of 8. There were no objections to this calculation. (ECF 945 p. 6). Mr. Day's criminal history was a category of VI giving him a sentencing guideline range of 18 to 24 months. Day's attorney filed objections to the PSR and any upward departure (ECF 721); the probation agent revised a portion of the PSR based on the objection, and the district judge denied the other objection and sentenced Day to 60 months.

Counsel have reviewed the records of these cases, researched the issues raised by Defendants and found them to have no merit. Therefore, this joint brief is submitted pursuant to *Anders v. California*, 386 U.S. 738 (1967). The issues raised in all of these appeals are whether the district court complied with the requirements of Fed. R. Crim. P. 11 in accepting the Appellants' guilty pleas and whether their sentences were reasonable.

SUMMARY OF ARGUMENT

ARGUMENT I: A review of the record indicates the district court fully complied with the requirements of Rule 11 of the Federal Rules of Criminal Procedure when the court accepted the defendants' guilty pleas.

ARGUMENT II: A review of the record also indicates that the district court's sentence was reasonable for each defendant.

STANDARD OF REVIEW (ARGUMENT I)

Generally, the standard of review as to whether the district court adequately complied with Rule 11 of the Federal Rules of Criminal Procedure is *de novo*. *United States v. Good*, 25 F.3d 218, 219 (4th Cir. 1994). Rule 11 provides that "a variance from the requirements of this rule is harmless error if it does not affect substantial rights." In the absence of an attempt to withdraw a defendant's guilty plea, Rule 11 violations are reviewed for plain error. *United States v. Martinez*, 277 F.3d 517 (4th Cir. 2002). To meet the plain error standard, Appellant must show that there was (1) error; (2) that it was plain; and that (3) affected his substantial rights. *United States v. Olano*, 597 U.S. 725, 732 (1993).

I. DID THE DISTRICT COURT FULLY COMPLY WITH THE REQUIREMENTS OF RULE 11 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE WHEN THE COURT ACCEPTED THE DEFENDANTS' GUILTY PLEAS.[1]

Rule 11(b)(1) of the Federal Rules of Criminal Procedure requires that, before accepting a plea of guilty, the court must address each defendant personally in open court and inform the defendant of, and determine that the defendant understands, the following:

[1] All of the Appellants pleaded guilty as a group on the same day. (ECF 922) This argument is submitted for all of them.

(A) the government's right, in a prosecution for perjury or false statement, to use against the defendant any statement that the defendant gives under oath;

(B) the right to plead not guilty, or having already so pleaded, to persist in that plea;

(C) the right to a jury trial;

(D) the right to be represented by counsel-and if necessary have the court appoint counsel-at trial and at every other stage of the proceeding;

(E) the right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses;

(F) the defendant's waiver of these trial rights if the court accepts a plea of guilty or nolo contendere;

(G) the nature of each charge to which the defendant is pleading;

(H) any maximum possible penalty, including imprisonment fine, and term of supervised release;

(I) any mandatory minimum penalty;

(J) any applicable forfeiture;

(K) the court's authority to order restitution;

(L) the court's obligation to impose a special assessment;

(M) the court's obligation to apply the Sentencing Guidelines, and the court's discretion to depart from those guidelines under some circumstances; and

(N) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence.

(O) that, if convicted, a defendant who is not a United States citizen may be removed from the United States, denied citizenship, and denied admission to the United States in the future.

Rule 11(b)(2) requires the court to determine the plea is voluntary and that the plea "did not result from force, threats, or promises other than promises in a plea-agreement."

Rule 11(b)(3) requires the court to determine that there is a factual basis for the plea before entering judgment.

Rule 11(c)(2) requires the parties to disclose the plea agreement in open court when the plea is offered unless the court for good cause allows the parties to disclose the plea agreement in camera.

Rule 11(c)(3)(B) requires that to the extent a defendant's plea-agreement is of the type specified in Rule 11(c)(1)(B), the court must advise the defendant that the defendant has no right to withdraw the plea if the court does not follow the recommendation or request.

During the Rule 11 proceeding in this case, the court placed Mr. Ashworth, Tomsha and Day under oath and informed them that any statement they gave under oath could be used against them as required by Rule 11. (ECF 922, p. 8, 14)

The court informed Messers Ashworth, Tomsha and Day of their rights to plead not guilty, their rights to have a jury trial, and their rights to be represented by counsel. (ECF 922, p. 38 - 39)

The court also informed Messers Ashworth, Tomsha and Day of their rights associated with having a trial such as the right to confront and cross examine adverse witnesses, to testify and present evidence, to compel the attendance of witnesses. (ECF 922, p. 39 - 41)

The court ensured that Messers Ashworth, Tomsha and Day understood they would be waiving their rights to a jury trial and all of the rights associated with a jury trial if the court accepted their guilty pleas. (ECF 922, p. 42)

The court informed Messers Ashworth, Tomsha and Day of the nature of the charges to which they were pleading guilty. (ECF 922, p. 50 - 51) The court informed Messers Ashworth, Tomsha and Day of the maximum possible penalty of imprisonment, fine and supervised release. (ECF 922, p. 51 - 52) The court further informed Messers Ashworth, Tomsha and Day of the court's obligation to apply the Sentencing Guidelines, and the court's discretion to depart from the guidelines in some circumstances. (ECF 922, p. 53 - 56)

Messers Ashworth's, Tomsha's and Day's plea agreements were summarized in open court. (ECF 922, p. 64 - 67)

The court reviewed the maximum penalties for the offense to which Messers Ashworth, Tomsha and Day entered their pleas, including the special assessment. There is no mandatory minimum sentence in this case. (ECF 922, p. 45, 51 - 52)

The district court judge reviewed the waiver of appeal provision with Messers Ashworth, Tomsha and Day. (ECF 922, p. 68 - 70)

The Government advised the court that there would be no forfeiture in this case, and the district court judge ascertained that forfeiture would not be an issue for Messers Ashworth, Tomsha and Day. Therefore, Messers Ashworth, Tomsha and Day were not advised that the court could order forfeiture as provided for in Rule 11(b)(1)(J). (ECF 922, p. 43, 45)

The court advised Messers Ashworth, Tomsha and Day of its authority to order restitution pursuant to Rule 11(b)(1)(K). (ECF 922, p. 43)

The court did not advise Messers Ashworth, Tomsha and Day that they could potentially be removed from the United States, denied citizenship, and denied admission to the United States in the future pursuant to Rule 11(b)(1)(O). Any such advice would have been useless since all three codefendants are citizens of the United States. (Ashworth PSR 31, Tomsha PSR 1 , Day PSR 1)

Before entering judgment, the court determined that there was a factual basis for the pleas. (ECF 922, p. 76 - 79, 81 - 82)

The court determined that Messers Ashworth's, Tomsha's and Day's guilty pleas were knowingly, voluntarily, and intelligently made with full knowledge of all the consequences that could result from the plea, and did not result from force, threats or promises other than promises contained in their plea agreements. (ECF 922, p. 59 - 63, 72 - 75)

Rule 11(c)(3)(B) requires that to the extent a defendant's plea-agreement is of the type specified in Rule 11(c)(1)(B), the court must advise the defendant that the defendant has no right to withdraw the plea if the court does not follow the recommendation or request. The plea agreements did not contain provisions specified in Rule 11(c)(1)(B).

It therefore appears that the district court fully complied with Rule 11 when the court accepted all three guilty pleas.

STANDARD OF REVIEW (ARGUMENT II)

The court reviews a sentence for reasonableness focusing on whether the district court abused its discretion. *Gall v. United States*, 128 S. Ct. 586, 597 (2007), *United States v. Pauley*, 511 F.3d 468, 473 (4th Cir., 2008). A court's decision to impose an upward departure is reviewed for abuse of discretion. *United States v. Myers*, 589 F.3d 117, 127 (4th Cir. 2009) "This court must decide whether the district court acted reasonably with respect to the decision to impose an upward departure and the extent of the departure." *United States v. Hernandez–Villanueva*, 473 F.3d 118, 123 (4th Cir. 2007)

II. WAS THE DISTRICT COURT'S SENTENCE REASONABLE.[2]

"When sentencing a defendant, a district court must: (1) Properly calculate the guidelines range; (2) determine whether a sentence within that range serves the factors set out in 18 U.S.C. § 3553(a); (3) implement mandatory statutory limitations; and, (4) explain its reasons for selecting a sentence." *United States v. Green*, 436 F.3d 449 (4th Cir.), *cert. denied*, 126 S. Ct. 2309 (2006).

Shannon Ashworth – On November 16, 2015 the court notified Mr. Ashworth that it would consider whether an upward variance to the advisory guideline sentencing range would be appropriate taking into consideration the information contained in the pre-sentence investigation report filed with the court, the sentencing factors contained in 18 U.S.C. Section 3553, other applicable law, and the information presented at the sentencing hearing. (ECF 611) The presentence investigation report is dated September 3, 2015 and was revised on November 23, 2015. (Ashworth PSR 3)

The district court judge began Mr. Ashworth's sentencing hearing by noting that he had reviewed the presentence report, the plea agreement, the defendant's

[2] These arguments are being made separately for each Appellant.

sentencing memorandum, the objections to the presentence investigation report, the motion for variance or non-guideline sentence, the Government's memorandum, notice of sentencing recommendation, and a victim impact statement. (ECF 928, p. 2 - 3)

The Presentence Investigative Report indicated (based on an adjusted total offense level of 15 and criminal history category of VI) that the guideline range was 41 to 51 months. (ECF 928, p. 6, Ashworth PSR 34) The adjustments to the base offense level noted in the presentence report were made pursuant to the stipulations in the plea agreement. (Ashworth PSR 30 - 31, ECF 380) The presentence report noted that the stipulations resulted in Mr. Ashworth receiving a lower guideline range than the discovery disclosed. (Ashworth PSR 37)

Counsel for Mr. Ashworth filed objections to the PSR and asked the court to sentence Mr. Ashworth below the guideline level. (ECF 809) At sentencing, Mr. Ashworth's attorney explained that she was objecting to the presentence report to support the logic of filing for a downward departure but questioned the conclusions to be drawn from, and not the facts contained in the report. (ECF 928, p. 4) After noting that the court gave notice that it would consider a sentence above the guideline range, Judge Cain reviewed the guideline calculation. The probation officer used the stipulations in the plea agreement to compute the advisory guideline sentence.

The Presentence Investigative Report indicated (based on an adjusted total offense level of 15 and criminal history category of VI) that the guideline range was 41 to 51 months. (ECF 928, p. 6, Ashworth PSR 34)

Mr. Ashworth's criminal history score was computed correctly using appropriate Chapter 4 calculations in the United States Sentencing Guidelines, for a resulting criminal history category of VI. (Ashworth PSR 20 - 26) The probation officer used the stipulations in the plea agreement to compute the advisory guideline sentence.

The Government asked the District Court to impose a sentence at the low end of the guidelines based on Mr. Ashworth's cooperation. Counsel for the Government noted that the cooperation did not rise to the level necessary to file a motion for downward departure for Mr. Ashworth, but did warrant a sentence at the low end of the calculation specified in the presentence report. (ECF 803, ECF 928, p. 7 - 8) In his motion, Mr. Ashworth asked the court to sentence him below the guideline based on his cooperation and assistance to the Government. (ECF 809, ECF 928, p. 9 - 11)

Judge Cain then ascertained that there were no further matters to be discussed prior to sentencing. (ECF 928, p. 11 - 12) After denying motions by the Government and Mr. Ashworth, the district court judge reviewed the court's obligation to calculate the appropriate guideline range and verified that he had complied with his obligation and heard all pertinent arguments from the Government and Mr. Ashworth. (ECF 928, p. 12) Judge Cain then set the stage for an appropriate analysis to support and upward departure, both by way of the Sentencing Guidelines, and using the Section 3553(a) factors.

U.S.S.G. § 4A1.3(a), p.s. provides detailed policy statements for upward departures based on the inadequacy of criminal history category or the likelihood that the defendant will commit other crimes. The district court applied the undisputed facts of Mr. Ashworth's presentence report to the terms of U.S.S.G. § 4A1.3(a), p.s. to sentence Mr. Ashworth above the guidelines. "An upward departure may be warranted under *U.S. Sentencing Guidelines Manual* § 4A1.3 if the sentencing court finds that a defendant's criminal history category does not represent the defendant's criminal history or the likelihood of recidivism." *United States v. Myers*, 589 F.3d 117, 125 (4th Cir. 2009). The Guidelines contemplate a situation in which even Criminal History Category VI is insufficient to reflect the seriousness of the defendant's criminal conduct, in which case the court may incrementally increase the offense level. *See* U.S.S.G. § 4A1.3(a)(4)(B).

Judge Cain also noted that he had reviewed the relevant Section 3553(a) sentencing factors and recited the factors that he planned to use as a basis to impose sentence, noting the nature and circumstances of the offense, the effect on the victims, the history and characteristics of Mr. Ashworth, the types and number of prior convictions that Mr. Ashworth had, and his inability to avoid criminal conduct while on court supervision. (ECF 928, p. 12 - 14)

The District Judge noted Mr. Ashworth had an extensive criminal record, a very poor history on supervision, and that he committed the crime for which he was charged while on probation. (ECF 928, p. 12 - 14). The district court judge noted he had reviewed Section 3553(A), Mr. Quinn's arguments, the nature and circumstances of the offense, the characteristics of the defendant, his record, his family, and the need for the sentence to reflect the seriousness of the offense; these considerations consumed at least eight pages of transcript. (ECF 928, pp. 12 - 20). The District Judge then explained his decision to depart upward on his sentence based on the Mr. Ashworth's extensive prior record, the seriousness of the crime, the impact on the victims, and the fact that 3553(A) was advisory and the guideline was not adequate in addressing these factors. (ECF 928, p. 16). He explained that the presentence report would have resulted in an offense level at least much greater than what was stipulated in the plea agreement and moved incrementally down the guideline range by 2 levels to category 17, resulting in a range of 51 to 63 months. The court sentenced the Defendant to the maximum 60 months. (ECF 928, p. 19 - 20)

The judge adequately addressed 18 U.S.C.A. § 3553. "Under Gall, we must first 'ensure that the district court committed no significant procedural error.' *Id.* at

597." *United States v. Seay*, 553 F.3d 732 (4th Cir., 2009). "A sentence may be procedurally unreasonable, for example, if the district court provides an inadequate statement of reasons or fails to make a necessary factual finding." *United States v. Moreland*, 437 F.3d 424 (4th Cir. 2006).

The District Court's recitation that he had considered 3553(a) was an adequate statement of reason.

> "Sentencing courts are statutorily required to state their reasons for imposing sentence. See 18 U.S.C.A. § 3553(c) (West Su .2009). Although a comprehensive, detailed opinion is not necessarily required, the court's explanation must nonetheless be sufficient 'to satisfy the appellate court that [the district court] has considered the parties' arguments and has a reasoned basis for exercising [its] own legal decision making authority.' *Rita v. United States*, 551 U.S. 338, 356, 127 S. Ct. 2456, 168 L. Ed. 2d 203 (2007)"

United States v. Engle, 592 F.3d 495 (4th Cir., 2010).

In summary, the district judge recited the applicable 3553(a) factors and described a host of applicable Section 3353 reasons for his sentence. Although Judge Cain did not review every factor, "[t]he district court need not robotically tick through § 3553(a)'s every subsection." *United States v. Engle*, 592 F.3d 495, 501 (4th Cir. 2010). Clearly there was no "talismanic recitation of the § 3553(a) factors without application to the defendant being sentenced . . . ." *Id*. at 501. And the district court demonstrated reasoned decision making and provided "an adequate basis for appellate review." *Id*. Finally, the court The district court made "an individualized assessment based on the facts presented when imposing a sentence, apply[ing] the relevant § 3553(a) factors to the specific circumstances of the case and the defendant, and . . . state(d) in open court the particular reasons supporting its chosen sentence." *United States v. Lymas*, 781 F.3d 106, 111, 113 (4th Cir. 2015)

The district court denied M. Ashworth's objections, denied the motion for variance, and sentenced Mr. Ashworth to 60 months of incarceration followed by and three years of supervised release. (ECF 827) (ECF 928, p. 16 - 17, 20 - 21) While Mr. Ashworth and his counsel disagree with the sentence he received, he cannot argue the sentence was not reasonable under applicable Fourth Circuit case law.

Jason Tomsha – As previously mentioned, the district court informed Tomsha prior to the sentencing hearing it was considering an upward departure in this case. Tomsha filed a motion for admission to the federal drug court program and a sentencing memorandum prior to the hearing. (ECF 762 & 763)

The district court reviewed the advisory sentencing calculations in Tomsha's PSR. It noted the base offense level, total offense level, and advisory range. (ECF 944, p.4 - 6) Because the advisory sentencing guidelines were correctly calculated, it appears the sentence was procedurally reasonable. *United States v. McGee*, 736 F.3d 263, 271 (4th Cir. 2013).

Substantive reasonableness is a more difficult question. This Court should consider the totality of the circumstances in reviewing for substantive reasonableness. *United States v. Hassan*, 742 F.3d 104, 150 (4th Cir. 2014).

The district court considered a number of factors in reaching its sentence. The government asked for a guideline sentence for Tomsha. (ECF 944, p.8) Tomsha made a similar request. While he had initially asked for a downward variance, counsel recognized the sentences comparable co-defendants were asking for and felt it was more realistic to ask the district court not to impose an upward departure. (ECF 944, p.9)

Tomsha's counsel pointed out in mitigation he had a long drug addiction that had never been treated. He asked for drug treatment in prison and argued a guideline sentence would be long enough to address Tomsha's addiction, but not longer than necessary. (ECF 944, p. 10) Tomsha elected to address the district court and echoed his counsel's request, pointing out the positive changes he had made in pretrial detention and his remorse for his actions. (ECF 944, p. 10 - 11)

The district court placed its reasons for its sentence on the record. It pointed out the nature and effect of the overall conspiracy in this case. (ECF 944, p. 13 - 14) It noted the effect the nature of the crime had on the victims. (ECF 944, p. 14)

The court was primarily concerned with Tomsha's criminal history, finding that a guidelines sentence neither adequately represented the seriousness of

Tomsha's conduct nor did it address the likelihood of future crimes. (ECF 944, p. 15) The court noted Tomsha had 65 prior convictions, but only 36 were counted based on time limits. (ECF 944, p. 15) To impose a sentence, the district court extended the criminal history category based on instructions from the Sentencing Commission. (ECF 944, p. 18)

The Court found that if the criminal history category on the sentencing table extended further, there would have been an additional six levels. This suggested the district court should go down the sentencing table a similar number of levels until an appropriate sentence was reached. (ECF 944, p. 18) The court used this method to reach the statutory maximum sentence of 60 months.

Recognizing that this Court has held a non-guidelines sentence is not presumed unreasonable, the Court has also held that a greater departure must be supported by more significant justification. *United States v. Abu Ali*, 528 F.3d 210, 261 (4th Cir. 2008). While review is deferential, it must be meaningful. *Id.*

While Tomsha and his counsel disagree with the sentence he received, he cannot argue the sentence was not reasonable under existing Fourth Circuit case law. The district court went through an extensive explanation of the reason for the sentence. The court primarily based its sentence on criminal history, which both the sentencing guidelines and this Court have previously held appropriate as a factor for an upward departure. *U.S.S.G.*, § 4A1.3; *United States v. McCoy*, 804

F.3d 349, 352 (4th Cir. 2015). Pursuant to that authority, Tomsha argues this issue pursuant to the mandate of *Anders*.

James M. Day - Appropriate notice was given to Defendant Day that the District Court would consider whether an upward variance and/or departure to the guideline range was appropriate in Mr. Day's case. ECF 682. At sentencing, the District Court noted that Mr. Day's attorney filed objections to the PSR, and that the probation officer revised a portion of the PSR in favor of Mr. Day based on that objection, and that there remained an objection to departing upward that would be dealt with later. (ECF 721; ECF 945 p. 4). The district court judge also adopted the presentence report as his findings of fact, reviewed the applicable advisory sentencing guideline offense level, criminal history category, corresponding guideline range, and the mandatory minimum sentence, to which neither the Government nor Mr. Day had any objection, except the one previously mentioned. (ECF 945 p. 2 - 6).

Mr. Day's sentencing guideline offense level for count 1 was correctly computed by reference to the United States Sentencing Guidelines which established a guideline offense level of 10. (ECF 945 p. 5) After a credit of 2 points for acceptance of responsibility pursuant to U.S.S.G. § 3E1.1(a), Mr. Day had a total offense level of 8. There were no objections to this calculation. (ECF

945 p. 6). Mr. Day's criminal history was a category of VI giving him a sentencing guideline range of 18 to 24 months.

The remaining portion of the objection raised by Mr. Day's attorney related to whether the District Court should sentence above the guidelines. The District Court noted the maximum sentence was five years; he went through the statutory guideline provisions and how the recommendation was calculated. (ECF 945 p. 5 - 6). The Government twice asked the District Court to impose a sentence within the guidelines and noted that based on the Defendant's involvement in the case and his acceptance of responsibility, that a guideline sentence would deter him from future criminal conduct as well as protect the public from further crimes. (ECF 945 p. 6 - 7).

Mr. Day's attorney, Thomas Quinn, noted his client's involvement was limited in the conspiracy and less than a year in length. In comparison, co-defendant Ashworth had a leadership role and a guidelines recommendation of up to 51 months, and was instead sentenced to 60 months, however, Ashworth's loss amount was $70,000 to $120,000, compared to Mr. Day's, $5,000 to $10,000. (ECF 945 p. 8). Mr. Quinn also noted that his client did in fact have a poor criminal history, but many of those offenses were unrepresented misdemeanors.

(ECF 945 p. 9).[3] Mr. Quinn also asked that the District Judge stay within the guidelines recommendation, but that if the District Judge did believe an upward departure was necessary, that it be structured according to Guideline 4A1.3(a)(4)(B) by moving incrementally down the sentencing table to the next higher offense level until a guideline range was appropriate to the case. (ECF 945 p. 10 - 11).

The District Judge noted that he had sentenced other defendants in the case above the guidelines. (ECF 945 p. 11). Mr. Quinn noted that those defendants were tier 1 or tier 2 defendants, and Mr. Day was a tier 3 defendant. (ECF 945 p. 12). Quinn clarified his position to explain that in Mr. Ashworth's case, the District Judge made an upward departure from 51 months to 60 months, and that it would be unfair to take Mr. Day from 24 months to 60 months when compared to that, especially because Mr. Day was a tier 3 defendant. (ECF 945 p. 12).

The District Judge noted Mr. Day had an extensive criminal record, a very poor history on supervision and that he absconded on bond. (ECF 945 p. 13). The judge then took a recess to consider Mr. Quinn's arguments; upon return he noted he had reviewed Section 3553(A), Mr. Quinn's arguments, the nature and circumstances of the offense, the characteristics of the defendant, his record, his family, and the need for the sentence to reflect the seriousness of the offense - these considerations consumed at least 3 pages of transcript. (ECF 945 p. 13 - 16).

[3] The District Judge accepted Mr. Quinn's criminal history numbers in considering sentencing. (ECF 945 p. 16).

The District Judge then explained his upward departure based on the Defendant's extensive prior record, the seriousness of the crime, the impact on the victims, and the fact that 3553(A) was advisory and the guideline was not adequate in addressing these factors. (ECF 945 p. 16). He then explained he did as Mr. Quinn requested, based on U.S. Sentencing Guideline 4A1.3(A)(2)(A)(B) and (E), and moved incrementally down the guideline range by 11 levels to category 17, resulting in a range of 63 to 78 months; he therefore sentenced the Defendant to the maximum 60 months. (ECF 945 p. 18 - 20).

1. The Guidelines were accurately calculated.

In reviewing a sentence, the Court should first determine whether the sentence was procedurally reasonable, for example that there are no errors in the guidelines calculation; because the advisory sentencing guidelines were correctly calculated, it appears the sentence was procedurally reasonable. *United States v. McGee*, 736 F.3d 263, 271 (4th Cir. 2013).

The Court must then consider the substantive reasonableness of the sentence under an abuse of discretion standard. Under this standard, Mr. Day complains there were two errors: That he was sentenced as harshly as the leader of the conspiracy, despite the fact that he was a tier 3 defendant. And that the judge focused too much on his criminal record.

2. Failure to treat similarly situated defendants with even a semblance of consistency constitutes substantive unreasonableness.

Mr. Day complains that he was sentenced to the same sentence as Ashworth, despite the fact that Day was a tier 3 defendant and Ashworth was a leader of the conspiracy and responsible for far more losses than Mr. Day. The Court must "consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard[,] ... tak[ing] into account the totality of the circumstances, including the extent of any variance from the Guidelines range." *United States v. Seay*, 553 F.3d 732 (4th Cir. 2009). Common sense dictates that a major departure should be supported by a more significant justification than a minor one." *United States v. Abu Ali*, 528 F.3d 210, 261 (4th Cir. 2008). This Court has held that a 6 year variance was substantial. *United States v. Diosdado-Star*, 630 F.3d 359 (4th Cir. 2011).

This was a substantial variance in that the District Judge added 36 months to a recommendation of 18-24 months. Furthermore, this substantial variance clearly resulted in these two defendants, Ashworth and Day, being treated very differently. The District Judge gave Ashworth an upward departure of 9 months. If Day were treated similarly, he would have received a sentence of 33 months. "A review for substantive reasonableness, however, 'demands that we proceed beyond a formalistic review of whether the district court recited and reviewed the § 3553(a) factors and ensure that the sentence caters to the individual circumstances of a defendant, yet retains a semblance of consistency with similarly situated defendants.' *Evans*, 526 F.3d [155] at 167 (Gregory, J., concurring)." *United States v. Howard*, Op. No. 13-4296 (4th Cir. 2014). Gregory's concurrence continues a long list of citations regarding the importance of reducing sentencing disparities and that consistent sentencing remains a significant priority, particularly when courts choose to venture beyond the correctly calculated guideline sentence. Contrary to the Guidelines intent, it is clear the District Judge treated these defendants differently.

Furthermore, the Government twice asked the District Judge to sentence the Defendant within the guidelines. See *United States v. Howard*, Op. No. 13-4296 (4th Cir. 2014) (The Government's recommendations are entitled to genuine consideration.) The Defendant was essentially stripped of all benefit of entering a guilty plea and entering a plea agreement with the Government. However, it is also clear the District Judge gave significant consideration and explanation as to why he was sentencing Defendant Day to 60 months. Considering the extensive recitation and the fact that the District Judge sentenced both defendants to the maximum sentence, it cannot be said that there is not a "semblance of consistency" in the sentences. *Gall v. United States*, 128 S. Ct. 586, 597 (2007) specifically directs that "any reasonable sentence be upheld."; See also, *United States v. Howard*, Op. No. 13-4296 (4th Cir. 2014) (An upward departure may be warranted if the defendant's criminal history category significantly underrepresents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes; and "Since the Supreme Court's decision in Gall, this Court has, *on rare occasion*, found a district court's sentence substantively unreasonable." [emphasis added]); *United States v. Seay*, 553 F.3d 732 (4th Cir., 2009) (affirming upward variance from 46 to 57 months, the high end of a five-level upward variance, to 96 months, based in part on the need to protect the public from further crimes of the defendant, and referencing the district court's finding that the defendant "had become increasingly dangerous over the years, progressing from possessing a knife to possessing a gun in connection with his stalking practices"); *United States v. Bellamy*, 264 F.3d 448 (4th Cir. 2001) (Affirming an upward variance from 51-63 months to a sentence of 137 months when a felon brandished firearm in a middle school in plain view of the students. The Court also found the guidelines did not reflect serious criminal history); *United States v. Diosdado-Star*, 630 F.3d 359 (4th Cir. 2011); *cert denied* 131 S. Ct. 2946 (2011) (Defendant impersonated BPA agent and stole massive amounts of money from illegal aliens. Court increased sentence 60 months to 84 months because danger to community and likely to re-enter).

Even if this sentence was considered unreasonable, unfortunately, Mr. Day waived his right to appeal these matters. While the Defendant may feel the sentence was unreasonable, he has waived his right to appeal that sentence, and undersigned counsel feels compelled to file this brief under *Anders v. California*, 386 U.S. 738 (1967).

3. Did the District Judge give excessive weight to one particular sentencing factor?

This Court has also repeatedly warned District Courts not to give excessive weight to any one relevant factor. In *United States v. Engle*, 592 F.3d 495 (4th Cir. 2010), the Court vacated a district court's sentence because it could not glean from the district court's decision why it failed to impose a term of imprisonment as recommended by the Guidelines, but the Court also addressed the substantive component of the sentence and noted that the district court committed error by its "near-exclusive focus" on the defendant's ability to pay restitution. In Defendant Day's case, the District Judge focused on Day's criminal history, however, the District Court also cited the likelihood that the defendant would commit further crimes as an additional reason the guideline recommendation was inadequate. (ECF 945 p. 16). He recited Day's poor history on supervision, including the fact that he absconded while on Federal Bond. (*Id.* p. 17). Furthermore, the judge gave considerable attention to Day's attorney, and took a recess to consider his arguments before pronouncing sentence. The judge gave a detailed list of the factors he considered in sentencing. (*Id.* p. 14). He specifically considered the serious nature of the offense and its impact on the victims. (*Id.* p. 15). The judge also noted the safety of the community and the seriousness of the crime as additional factors for his sentence. It cannot be said that the District Judge relied too heavily on the defendant's criminal history. Again, even if the District Judge focused too heavily on the Defendant's prior record, Mr. Day waived his right to appeal, and undersigned counsel feels compelled to file this brief under *Anders.*

CONCLUSION

In accordance with the requirements of the decision of the United States Supreme Court in *Anders v. California*, 386 U.S. 738 (1967), appointed counsel for Messers Ashworth, Tomsha and Day have reviewed both the facts and legal issues in these cases. It is counsels' opinions that there are no legal issues that were not properly raised or disposed of by the trial court and that there are no grounds for an appeal in this case to the Court of Appeals. A copy of this brief has been served on the Appellants.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

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Dated: July 11, 2016

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 11th day of July, 2016, I caused this Brief of Appellants to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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